TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 57

SCAIFE COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 23, 1941.

CERTIORARI GRANTED JUNE 2, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1941.

—4947

[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7509

SCAIFE COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

[fol. 1] **Appendix to Brief for Petitioner**

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 94813

WM. B. SCAIFE AND SONS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Petitioner: S. Leo Ruslander, Esq., Samuel Kaufman, Esq.

For Respondent: J. Harrison Miller, Esq., Orris Bennett, Esq.

DOCKET ENTRIES

1938

July 21. Petition received and filed. Taxpayer notified. (Fee paid.)

July 21. Copy of petition served on General Counsel.

Sept. 19. Answer filed by General Counsel.

Sept. 19. Request for Circuit hearing in Pittsburgh, Pa. filed by General Counsel.

Sept. 26. Notice issued placing proceeding on Pittsburgh, Pa. Calendar. Copy of answer and request served.

1939

Aug. 22. Hearing set Sept. 11, 1939, Pittsburgh, Pa.

Sept. 2. Motion for leave to file amended answer filed by General Counsel—Amendment to answer lodged.

Sept. 6. Copy of motion for leave to file amendment to answer served on taxpayer.

[fol. 2]

Sept. 15. Hearing had before Mr. Smith on merits. Submitted. Respondent moves to file amendment to answer—objection by petitioner, who made general denial of res adjudicata issue—motion granted. Motion to file amendment to answer and amendment to answer filed. Partial stipulation of facts, with 1 copy of Exhibit "B" attached, filed. Briefs due Nov. 1, 1939—no exchange of briefs.
Sept. 26. Transcript of hearing Sept. 15, 1939 filed.
Oct. 20. Brief filed by General Counsel.
Nov. 1. Brief filed by taxpayer.

1940

Feb. 6. Opinion rendered—Charles P. Smith, Division 5. Decision will be entered under Rule 50.
Mar. 8. Computation of deficiency filed by General Counsel.
Mar. 12. Hearing set March 27, 1940 on settlement.
Mar. 23. Consent to settlement filed by taxpayer.
Mar. 27. Decision entered—Charles P. Smith, Division 5.
June 20. Petition for review by U. S. Circuit Court of Appeals, Third Circuit, filed by taxpayer.
June 21. Proof of service of petition for review filed.
July 5. Designation of contents of record filed by taxpayer.
July 8. Proof of service filed.

[fol. 3] Before United States Board of Tax Appeals

Docket No. 94813

William B. Scaife and Sons Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Reporter's Minutes

Hearing at Pittsburgh, Pennsylvania, on the 15th day of September, 1939, at 9:35 A. M.

The above-entitled proceeding came on for hearing on this the 15th day of September, 1939, before the Honorable Charles P. Smith, Member of the United States Board of Tax Appeals, at Pittsburgh, Pennsylvania, pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to-wit:

APPEARANCES:

Samuel Kaufman, Esq., (First National Bank Building, Pittsburgh, Pa.), appearing on behalf of Petitioner.

J. Harrison Miller and Orris Bennett, Esqs., (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

Proceedings

Mr. Kaufman: Both sides are ready.

The Clerk: Please state your appearances.

[fol. 4] Mr. Kaufman: Samuel Kaufman for Petitioner.

Mr. Miller: J. Harrison Miller and Orris Bennett, for Respondent.

Your Honor, we have in this case filed an application to file an amended answer and that amended answer has been lodged with the Board. If I understand right, final action as to whether or not the Respondent is entitled to file an amended answer has not been acted upon.

Mr. Kaufman: If your Honor please, Petitioner has no objection to the amendment provided the record shows that the issue therein raised is denied by the Petitioner.

The Member: Is denied by the petitioner?

Mr. Kaufman: By the Petitioner. It merely raises a question of res adjudicata. We think that there is no merit to the issue, and we also think that the Respondent could probably argue that as a matter of law without raising it in the pleadings.

The Member: With that understanding, the amendment to the answer is allowed.

STATEMENT OF CASE ON BEHALF OF PETITIONER BY MR. KAUFMAN

Mr. Kaufman: If your Honor please, this case involves just one issue, and that is the amount of the credit to be [fol. 5] allowed to the Petitioner for the purpose of the excess profits tax for the year 1936. It is one of the two

return cases. There have been other cases before the Board falling within that general class, but we believe strongly that this case is different from any other case which the Board has had to hear, and in this respect does not involve in the present case an offer by the Petitioner to amend a capital stock tax report.

The report originally filed at the end of July, 1936, was erroneously filed, after its erroneous preparation by the treasurer in ignoring instructions which he had theretofore received.

Just a little more than a month thereafter, when the error was brought to the attention of the other officers of the company, the treasurer, who prepared and signed the original report, prepared this second report showing the value which had been agreed upon by the officers of the corporation prior to the filing of the first report. We propose to prove all these things so that it is our contention that the second report lodged with the Collector was the only report of the corporation, the first one having been prepared in error and without regard to the determination which had been arrived at by the officers of the corporation. They had never determined to file a report showing a declared value of $600,000. They had always determined that the declared value should be $1,000,000, and, therefore, the credit should be allowed on the basis of the higher value.

The record will show that the Collector accepted only the tax based on a $600,000 declared value, and that the Petitioner tendered the additional $400, based on the higher value, which the Collector refused to accept, and the record will also show that the petitioner always has been and still is ready and willing to pay the additional tax of $400.

[fol. 6] STATEMENT OF CASE ON BEHALF OF RESPONDENT BY MR. MILLER

Mr. Miller: Your Honor, the Respondent takes the position that the capital stock tax return filed by the Petitioner on July 29, 1936, for the fiscal year ended June 30, 1936, was their capital stock tax return. The value of $600,000 stated therein was their declared value and that, under the provisions of 105-F of the Revenue Act of 1935, the Petitioner did not have a right to file an amended return declaring another value.

It is also the position of the Respondent that the Petitioner is estopped now to claim that he is entitled to the use

of a value other than this $600,000 inasmuch as that question has been litigated in the courts, in the District Court of the Western District of Pennsylvania, reviewed by the Circuit Court of Appeals, and the Supreme Court of the United States, and denied certiorari.

By Mr. Kaufman:

Mr. Kaufman: Just a word in answer to the new issue raised by the Respondent. It depends upon the doctrine of res adjudicata. That action, the Board should bear in mind, was between different parties than are involved in this proceeding. That was an action in equity by this Petitioner against the Collector of Internal Revenue seeking equitable relief in connection with the filing of the capital stock tax return. There was not involved in that case any question of liability for excess profits tax such as is involved in the present proceedings between the Petitioner and the Commissioner of Internal Revenue, so that, with that distinction [fol. 7] in mind, I think the authorities will show that the doctrine of Res Adjudicata does not apply, being a different issue, different parties.

The Member: I should say you were correct.

Mr. Kaufman: Thank you.

We have a stipulation covering most of the record facts, which is now submitted to the Board in duplicate, with this understanding, that this stipulation was rewritten late yesterday, and I have not yet had an opportunity to check the changes, so that it is submitted subject to check, subject to check by both parties.

The Member: With that understanding, the stipulation of facts is received in evidence.

Mr. Kaufman: There is submitted, as Exhibit B, which is referred to in the stipulation of facts, a copy of the record in the United States Circuit Court of Appeals in the action between this Petitioner and the Collector of Internal Revenue referred to in the opening statement and stipulation.

The Member: That will be received and filed with the stipulation.

Mr. Kaufman: Before we proceed with the oral testimony, I would suggest that your Honor read just the one page, being Exhibit A, attached to the stipulation. It is the letter to which I referred which the former treasurer wrote with the second return.

[fol. 8] EVIDENCE ON BEHALF OF PETITIONER

Thereupon the Petitioner, to maintain the averments of its Petition, introduced the following proof:

Testimony of Mr. Archie Vernon Murray

MR. ARCHIE VERNON MURRAY called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name.

The Witness: Archie Vernon Murray.

Direct examination.

By Mr. Kaufman:

Q. What is your occupation, Mr. Murray?

A. I am secretary and treasurer of the William B. Scaife and Sons Company.

Q. By profession, you are a certified public accountant?

A. I am.

Q. When did you become treasurer of William B. Scaife and Sons, which is the Petitioner in this case?

A. On June 1st, 1937.

Q. Were you employed by the company in the summer of 1936?

A. I was, from January 1st, 1936, until the present.

Q. In July and September, 1936, you were not an officer of the company?

A. I was not.

Q. Your predecessor in office was Mr. Frey?

[fol. 9] A. Yes; Mr. Mitchell Frey.

Q. Will you state whether or not you were present at the discussion had between Mr. A. M. Scaife and Mr. Frey prior to July, 1936, with reference to a capital stock report for the Petitioner?

A. I was not present at that discussion.

Q. You were not present?

A. I was not present.

Q. Mr. A. M. Scaife is vice president of the company?

A. Yes.

Q. Will you state whether or not you know about his leaving the country during the summer of 1936?

A. Mr. Scaife left the country for a European trip in the latter part of June, 1936, and returned in the early part of September, to the best of my knowledge.

Q. Had you, in your capacity as an employee of the company, received any instructions from Mr. Scaife with reference to the capital stock report before his departure?

A. Before his departure, we had discussed the valuations which — were to make for that year.

Q. Whom do you mean by "we had discussed"?

A. Mr. Scaife and myself.

Q. Yes, sir.

A. And at that time felt that a million dollars was a proper valuation.

Q. Did Mr. Scaife at that time determine that that should be the declared value?

Mr. Miller: I object, your Honor. The excess profits return filed for that period should speak for itself.

The Member: Objection overruled.

[fol. 10] Mr. Kaufman: You may answer, please.

The Member: Read the question, please.

(Thereupon the last question was read by the reporter as recorded.)

A. His reaction was that the million dollars should be the declared value.

The Member: When you say "reaction" what do you mean?

The Witness: He believed that it should be—the million dollars should be the declared value.

The Member: Why do you say he believed that?

The Witness: Only taking his——

By Mr. Kaufman:

Q. What did he say, Mr. Murray? I think that is what the Board would like to know.

A. After discussing the matter with me, he said that he believed that a million dollars was the proper value to return, based on the facts that we had.

Q. Did you have anything to do with the preparation of this return, Mr. Murray?

A. I did not.

Q. Did you know that a return was required to be filed in July of 1936?

A. Yes.

Q. When did you first learn about the fact that the return had been filed in the amount of $600,000?

[fol. 11] A. In about September 1st, or, I beg your pardon, on September 3, when we were posting the books for the month of July.

Q. Will you explain how that came to your attention at that time?

A. Well, I was engaged at that time to install a new pay roll, cost and store system. The posting of the books was considerably behind. We made the change-over in the system as of August 1st, and it was not until September 3rd that we were prepared to post the general ledger for the month of July, at which time I noticed that the entry for Federal capital stock for 1936 indicated a payment of $600, at which time I immediately questioned it, knowing that our previous discussion, or my previous discussion with Mr. Scaife was to the effect that the return was to be made on the basis of a million dollars.

Q. What did you then do, Mr. Murray?

A. I brought it immediately to the attention of Mr. Scaife and Mr. Frey.

Q. And that resulted in the filing of this so-called second return on or about that same day?

A. Yes, sir.

Q. Do you know Mr. Frey's present physical and mental condition, Mr. Murray?

A. I can answer only from personal observation. Mr. Frey has been under the care of a physician since a few months after his retirement.

Q. When was that?

A. He retired, left active service, about the middle of July, 1937.

Q. Would you state, based upon your observation, what his condition is?

A. Such that he hasn't full control of his faculties, either physical or mental.

[fol. 12] Q. Did you recently interview him for the purpose of determining whether to bring him to court in connection with this case?

A. On Tuesday of this week.

Q. Based on that interview, you decided not to bring him?

A. For his own good, I felt it would not be good to bring him here, since he has been in bed nine of the last eighteen months.

Q. How old is the gentlemen, or approximately how old?

A. Mr. Frey is over 65.

Q. What would you say as to his conduct in the summer of 1936?

A. That he was showing the effects of some illness at that time.

Mr. Kaufman: Cross-examine.

Mr. Miller: I do not wish to cross-examine at this time, but I would like for the witness to stay through the proceeding. We may want to call him later.

Witness excused.

Testimony of Allen Magee Scaife

Allen Magee Scaife, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name.

The Witness: Allen Magee Scaife.

[fol. 13] Direct examination.

By Mr. Kaufman:

Q. Mr. Scaife, you are the vice-president of the Petitioner?

A. I am.

Q. You were in 1936?

A. I was.

Q. And were the matters of tax returns under your supervision at that time?

A. They were.

Q. Do you recall the circumstances with reference to the Federal capital stock tax report of 1936 before you went to Europe in June of that year?

A. Yes, I do.

Q. Will you state briefly what those circumstances were?

A. After a discussion with Mr. Murray, I deemed it advisable to instruct Mr. Mitchell Frey, who was then treasurer of our company, to make a return showing a stated valuation of $1,000,000. Previously we had discussed the advisability of submitting, making a lower return. The figure at that time that we had under discussion was $600,-

000. In view of the increased prospects of the company for earnings during 1936, it seemed very advisable to raise the limit to a stated value of $1,000,000.

Q. Did you so instruct Mr. Frey at that time?

A. I instructed Mr. Frey to that effect.

Q. And he agreed that that was a proper value——

A. Yes.

Q. —at that time?

A. Yes.

Q. Then, when did you leave this country in the summer of 1936?

[fol. 14] A. I left, I think it was the 26th or 27th of June.

Q. Then you returned late in August or early in September?

A. I returned—I landed in New York the latter part of August, and came to Pittsburgh the early part of September.

Q. Then, as Mr. Murray testified, he called this matter to your attention on or about September 3rd?

A. That is correct.

Q. Then what did you do?

A. I discussed the matter with Mr. Frey. Mr. Frey recalled the conversation, admitted having made an error, and wrote a letter, which he showed me, and which he submitted with the so-called amended return, the date of which was September 3.

Q. And he told you that he had forgotten about your instructions?

A. Yes.

Q. I believe the first return in the amount of $600,000 was signed in your absence by your brother, James Verner Scaife, president of the company?

A. That is right.

Q. In the course of his duties, does he give personal attention to matters of taxation?

A. At that time, he did not.

Mr. Miller: Then, I would like to object to that on the ground that the president of the corporation signed this return, and it seems to me that in his official capacity, the Court should take judicial notice, that he must have known what was in the return when he signed it.

Mr. Kaufman: We propose to show that he signed merely [fol. 15] as a matter of routine. He didn't take any part in the matters of discussion.

The Member: The objection is overruled.

Mr. Kaufman: Will you read the question and answer, please?

(Thereupon the last question and answer were read by the reporter as recorded.)

Mr. Kaufman: I think that is a fair answer to the question. Cross-examine.

Mr. Miller: I would like to have this document submitted for identification.

Mr. Kaufman: May I see it just a moment?

The Clerk: Marked for identification Respondent's Exhibit A.

Mr. Kaufman: That is already in the record.

Mr. Miller: I want to ask some questions about it.

Mr. Kaufman: All right.

Cross-examination.

By Mr. Miller:

Q. Can you tell me by whom that return was signed?

A. That is signed by my brother, the president of the [fol. 16] company at that time, and Mr. Frey, who was the treasurer of the company.

Q. Do you recognize that as the capital stock tax return of William B. Scaife and Sons, filed with the Collector under date of July 29, 1936?

Mr. Kaufman: That, your Honor, is objected to, as not proper cross examination of this witness. He didn't sign it, didn't make it. He testified he was not here when it was made. I doubt if he ever saw it before.

The Member: Objection overruled.

A. I don't recall ever having seen this before.

By Mr. Miller:

Q. You don't recall that, then, as the capital stock tax return filed under date of July 29, 1936?

The Member: Is there any question between counsel that that was the return filed?

Mr. Kaufman: No, your Honor. A copy of that is part of the stipulation.

The Member: But you wish to put in the original?

Mr. Miller: I think, your Honor, I would like to put the original in evidence.

Mr. Kaufman: The stipulation states that the exhibits attached to the printed record are true and correct copies [fol. 17] of the exhibits, and that is one of them. I don't know that there is any serious objection except that it is repetition in the record.

Mr. Miller: I would like to offer this in evidence.

The Member: Without objection, it is received as Respondent's Exhibit A.

(The 1936 Capital Stock Tax Return, so offered and received in evidence, was marked Respondent's Exhibit A, and made a part of this record.)

By Mr. Miller:

Q. You say you went to Europe the latter part of June, 1936, and returned early in September?

A. Yes.

Q. What time did you return in September?

A. I landed in New York the 27th of August, I believe, and came to Pittsburgh a few days later.

Q. How did you learn that the capital stock tax return declared a value of $600,000?

A. Mr. Murray telephoned me, and, as I recall the conversation, he said, "Do you recall our agreement to submit capital stock tax return on the stated value of a million dollars?" I said, "I do." He said, "Did you know Mr. Frey made the return on the basis of $600,000?" I said, "I had not known that." I said, "That was directly contrary to my instructions to Mr. Frey before my departure." And then I got Mr. Frey on the telephone, and discussed the matter with him, and I asked him why he had done it, and he admitted that it was an error.

Q. By "error" do you mean that he forgot the instructions?

[fol. 18] A. It was an error for him not to follow my instructions at the time I discussed the matter with him previously.

Q. Is V. P. Scaife your brother?

A. J. V. Scaife.

Q. What is his capacity?

A. He is president of William B. Scaife and Sons Company.

Q. Is he active?
A. Yes.
Q. Is he acquainted with the affairs of the corporation?
A. Yes.
Q. Did he sign the capital stock tax return?
A. He did.
Q. And did he swear to the return as being true and correct?
A. I assume so.
Q. Where is he at the present time?

Mr. Kaufman: He is right here, Mr. Miller. We are going to call him.

By Mr. Miller:

Q. Where is Mr. Frey?
A. Mr. Frey is at his residence. I don't know the address. It is in the East End.

Mr. Miller: That is all.
Mr. Kaufman: That is all.

Witness excused.

[fol. 19] Testimony of James Verner Scaife

James Verner Scaife, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:
The Clerk: State your name, please.
The Witness: James Verner Scaife.

Direct examination.

By Mr. Kaufman:

Q. You are the president of the Petitioner?
A. Yes, sir.
Q. And you were president in 1936?
A. Yes, sir.
Q. Who was president of the company before you, Mr. Scaife?
A. My brother, Mr. A. M. Scaife.
Q. Your brother, who testified here?
A. Yes, sir.

Q. Who was president before him?
A. My father.
Q. When your father was living, he looked after matters of taxation?
A. Yes, sir, entirely.
Q. Then, when your brother became president, did he inherit that work?
A. Yes, sir, he did.
Q. In 1936 you were not paying any attention to matters of taxation?
A. No, sir, I was not.
Q. When you signed this return, which is marked Re-[fol. 20] spondent's Exhibit A, in July of 1936, did you examine it?
A. I don't believe I did, sir. I took it more as a routine, perfunctory duty. I was under the impression that my brother, before he left for Europe, had instructed Mr. Frey exactly what to do.
Q. Did Mr. Frey prepare this return?
A. Yes, sir, he did.
Q. Did he hand it to you for your signature?
A. Yes, sir, he did.

Mr. Kaufman: Cross examine.

Cross-examination.

By Mr. Miller:

Q. You signed the capital stock tax return?
A. Yes, sir, I did.
Q. You didn't enter any objection to it?
A. No, sir, I did not.
Q. You swore to the return?
A. I didn't hear you, sir.
Q. You swore to the return?
A. Yes, sir.
Q. As being a correct return?
A. Yes, sir.

Mr. Miller: I would like to have this identified as Respondent's Exhibit.
The Clerk: Marked for identification Respondent's Exhibit B.
[fol. 21] Mr. Miller: Would your Honor care to look at the capital stock return that we have been talking about?

Mr. Kaufman: Counsel for Respondent would request that we stipulate for the record that in the corporation income and excess profits return of the Petitioner for the calendar year, 1936, filed March 15, 1937, executed by J. V. Scaife, Jr., President, and M. M. Frey, Treasurer, also executed by M. M. Frey and Archie V. Murray, the persons who prepared the return. In the excess profits tax computation the value of the capital stock, as declared in the capital stock tax return for the year ended June 30, 1936, is stated to be $600,000.

Mr. Miller: No further questions.

Witness excused.

Mr. Kaufman: I should like to recall Mr. Murray for one or two questions.

Archie V. Murray—Recalled

Archie V. Murray, a witness previously called by and on behalf of the Petitioner, was recalled, and having been heretofore duly sworn, was further examiner and testified as follows:

Direct examination.

By Mr. Kaufman:

Q. Mr. Murray, you have heard the stipulation just read into the record about the 1936 income and excess profits tax——

[fol. 22] A. Yes, sir.

Q. —which is signed by you and Mr. Frey as the persons who prepared it, and you heard it stipulated that the declared value was there shown at $600,000?

A. Yes.

Q. Will you explain why you prepared the return on that basis?

A. During the preparation of the return and in view of the suit that had been brought in connection with the 1936 capital stock tax return.

Q. Oh, you mean that that suit was already pending at that time. Well, by reference to the record of the case, I see it was started November 24, 1936.

A. There was some question as to the value to be shown. Upon advice of our then accountants, Main and Company, I filed it at $600,000 or showed it as $600,000 on the income tax return.

Q. By "some question", do you mean that you wanted to show it at $1,000,000?

A. Definitely.

Q. And you were advised that pending the outcome of that suit, it should be stated in the other amount?

A. Yes, sir.

Mr. Kaufman: Cross examine.

Mr. Miller: No cross examination.

Witness excused.

Mr. Kaufman: That is our case, if your Honor please. No further questions.

[fol. 22] Mr. Miller: Respondent rests.

COLLOQUY

The Member: Counsel will desire to file briefs, I assume.

Mr. Kaufman: Unless your Honor is willing to disallow the deficiency without them.

The Member: What is the statute that prevents the filing of amended capital stock tax returns?

Mr. Miller: Does your Honor want to see it, or do you want it read into the record?

The Member: Just note it for the record.

Mr. Miller: Section 105-F of the Revenue Act of 1935.

The Member: What is the sentence that the Respondent is relying upon?

Mr. Miller: "For the first year ending June 30, in respect of which a tax is imposed by this section upon any corporation, the adjusted, declared value shall be the value as declared by the corporation in its first return under this section (which declaration of value cannot be amended) as of the close of its last income taxable year ending at or prior to the close of the year for which the tax is imposed by this section."

[fol. 24] The Member: That is the sentence I had in mind. The Board, of course, has had occasion to consider that language in a number of decisions, and I certainly don't want to pass upon this case until I have had a chance to look up those other opinions of the Board and what the

Courts have done also but I would like to ask counsel for the Petitioner how he can get around that language. As I understand it, there was the first return that was filed. Apparently it was properly executed. It is the contention of the Petitioner, I suppose that it was an error to put in the value at $600,000 instead of a million dollars. How can that original return be amended?

Mr. Kaufman: We contend that we are not amending the original return. We say that the original return did not reflect the considered judgment of the corporation, was not a return showing a declared value, that it must be ignored, and the second one be considered the original one. That is our position that under the facts here it must be concluded, as a matter of fact, that the return showing the million dollar value was the original return, that the million dollar value was the original declared value. The statute does not speak about amended returns. It speaks about declared values. It is our contention, therefore, that the value of a million dollars was the original declared value, that the amount erroneously shown on that return must be ignored on the facts.

The Member: I think I will decide this case against the Petitioner on the authority of two or three decisions filed [fol. 25] by the Board, but I will give each party an opportunity to file briefs but they will be without exchange.

Mr. Kaufman: How long, your Honor?

The Member: Until November 1st, that will be forty-five days, and they will be received without exchange.

(Hearing concluded.)

EXHIBIT "A"

Wm. B. Scaife & Sons Co.,

Pittsburgh, Pa.

September 3, 1936.

Collector of Internal Revenue, Federal Building, Pittsburgh, Pa.

DEAR SIR:

Attention is called to our Annual Capital Stock Tax Return for 1936. I am attaching in triplicate amended

Federal Capital Stock Tax Return which we request you accept in place of the one originally filed.

The determination of the proper amount to be returned has always been made by our Vice-President, Mr. A. M. Scaife, who was in Europe at the time of the filing date. Through an error I overlooked following his instructions to make the return on the basis of $1,000,000.00 rather than the amount shown.

[fol. 26] While the President of the Company together with myself signed the return, the question of altering the amount shown in previous returns was not discussed.

I made an error in stating the amount which according to my instructions should be $1,000,000.00 instead of $600,000.00 and this error was not uncovered until today, otherwise, it would have been called to your attention.

Enclosed please find check for $400.00 to cover the additional tax liability for the amended report.

Yours truly, Wm. B. Scaife & Sons Co., M. M. Frey, Jr., Treasurer.

Before United States Board of Tax Appeals, Washington

Docket No. 94813

Wm. B. Scaife & Sons Co., Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Decision

Pursuant to the Opinion of the Board promulgated February 6, 1940, the respondent herein having on March 8, 1940, filed a recomputation, and the petitioner having on March 23, 1940, filed an acquiescence therein, now therefore, it is

[fol. 27] Ordered and Decided: That there are deficiencies in income tax and excess profits tax for the taxable year 1936 in the respective amounts of $1,679.15 and $812.70.

Enter:

(Signed) C. P. Smith, Member.

Entered Mar. 27, 1940.

BEFORE UNITED STATES BOARD OF TAX APPEALS

OPINION

SMITH:

This proceeding involves an income tax deficiency for 1936 in the amount of $1,946.63 and an excess-profits tax deficiency for that year in the amount of $942.15. Petitioner alleges that the respondent erred (1) in adding to its income an overstatement of Pennsylvania capital stock tax in the amount of $1,919.97, and (2) in refusing to allow a declared capital stock value of $1,000,000 as a basis for computing its excess-profits tax.

The first issue has been settled by stipulation filed at the hearing, the parties having stipulated that petitioner is entitled to a deduction from gross income in the amount of $917.55, in addition to the amount of $2,294.25 previously allowed, and may be entitled to a further deduction in the amount of $229.42 depending upon the action taken on its petition to the Pennsylvania Board of Finance and Revenue.

As to the second issue the essential facts are as follows:

On July 29, 1936, there was filed on behalf of the petitioner a Federal capital stock tax return for the period ended June 30, 1936, in which the original declared value [fol. 28] of its capital stock was stated at $600,000. The return was prepared by the petitioner's treasurer and signed by petitioner's president, J. V. Scaife.

Early in September 1936, it came to the attention of petitioner's officers that in the preparation of the return the petitioner's treasurer had declared a capital stock valuation of $600,000, whereas he had been instructed by petitioner's vice-president, A. M. Scaife, to report a declared capital stock value of $1,000,000. Petitioner's president, who signed the return, did not examine it carefully and was not aware of the fact that the lower capital stock valuation of $600,000 had been declared. The petitioner's president, J. V. Scaife, and its vice-president, A. M. Scaife, were brothers.

On September 3, 1936, the petitioner lodged with the collector of internal revenue at Pittsburgh, Pennsylvania, its Federal capital stock tax return for the period ended June 30, 1936, in which the declared value of its capital stock was stated at $1,000,000 and tendered to the collector its

remittance in the amount of $400 to cover the additional Federal capital stock tax computed on that basis. The collector returned to the petitioner the $400 so tendered and refused to accept for filing the amended capital stock tax return, but did retain the return and transmit it to the Commissioner of Internal Revenue as a part of the record in the case.

On November 24, 1936, the petitioner instituted in the District Court of the United States for the Western District of Pennsylvania an action seeking to enjoin the collector of internal revenue at Pittsburgh from refusing to receive and accept the amended return and substitute it for [fol. 29] the original return previously filed. The petition was denied by the District Court, 18 Fed. Supp. 748, and the lower court's opinion was affirmed by the United States Circuit Court of Appeals for the Third Circuit, 94 Fed. (2d) 664.

Section 105 of the Revenue Act of 1935 provides in part as follows:

SEC. 105. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock.

* * * * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. * * *

* * * * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by [fol. 30] the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). * * *

In Haggar Co. v. Helvering, — U. S. — (Jan. 2, 1940), the Supreme Court held that the declaration of capital stock value as contained in the first capital stock tax return filed by a taxpayer pursuant to section 215 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 207, which was carried forward into the subsequent revenue acts, may be amended within the time fixed for filing such return. The Board and some of the lower courts previously had taken the view that the statute permitted no amendment to the declaration of value contained in the first return properly filed by the taxpayer. See William A. Webster Co., 37 B. T. A. 800; Haggar Co., 38 B. T. A. 141; affd., 104 Fed. (2d) 24; A. J. Crowhurst & Sons, Inc., 38 B. T. A. 1072; Blake & Kendall Co v. Commissioner, 104 Fed. (2d) 679; Chicago Telephone Supply Co. v. United States, 23 Fed. Supp. 471; certiorari denied, 305 U. S. 628. The Haggar Co. case sustains Glenn v. Oertel Co., 97 Fed. (2d) 495, and Philadelphia Brewing Co. v. United States, 27 Fed. Supp. 583, where the opposite view was taken.

There is a factual difference between the instant case and the Haggar Co. case which we believe to be vital. There, the amended capital stock tax return containing the new declaration of value was offered within the statutory time [fol. 31] for filing such return, as extended by Treasury Decisions 4368 and 4386, whereas in the instant case the amended return was not submitted to the Commissioner until after the expiration of the due date.

Under section 105 (a) and (d), above, the time for filing the capital stock tax return for the petitioner's taxable year ended June 30, 1936, expired on July 31, 1936. So far as the stipulated facts disclose, or as we are able to determine from an examination of the Treasury decisions and

rulings, no extension of the time for filing such return was granted either by general extension, as in the Haggar Co. case, or by specific grant to this petitioner. Apparently no extension of time for filing was asked and no amendment of the return which it had already filed was suggested by the petitioner until September 3, 1936, more than a month after the expiration of the filing period.

Throughout its opinion in the Haggar Co. case the Court emphasized that the amended return there was offered within the time for filing of the return for that taxable year. We quote from the opinion:

In August, 1933, petitioner, a Texas corporation, mistakenly believing that it was required to state the par value of its issued capital stock in its tax return, filed a *timely return* for the year ending June 30, 1933, * * * The date for filing returns for that year having been extended to September 29, 1933, T. D. 4368, 4386, petitioner *before that date* filed an amended return. * * *

* * * The Circuit Court of Appeals for the Fifth Circuit affirmed, holding that § 215(f) by its terms precluded any amendment of the tax return for the first year even though made *within the time allowed* for filing the return. 104 F. (2d) 24. * * *

[fol. 32] The Commissioner founds his argument in support of the decision below upon a literal reading of the introductory sentence of § 215 (f) already quoted, which, he argues, precludes even a *timely amendment* of the tax return for the first year, and upon the administrative and Congressional interpretation of the statute. He insists that the phrase "first return" in the clause "declared value shall be the value as declared by the corporation in its first return under this section (which declaration of value cannot be amended)," means the first paper filed by the taxpayer as a return, and that these words plainly forbid any amendment of the declared value of the capital stock, even though made *within the time allowed* for filing the return.

* * * * * * *

"First return" thus means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a *timely amended return* for that year. A *timely amended return* is as much a "first return" for the purpose of fixing the

capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year. Glenn v. Oertel Co., supra; Philadelphia Brewing Company v. United States, supra; see also, similarly construing the phrase "first return" under § 114 (b) (4) of the Revenue Act of 1934, 48 Stat. 680, 710; C. H. Mead Coal Co. v. Commissioner, 106 F. (2d) 388, 390; cf. Pacific National Co. v. Welch, 304 U. S. 191, 194. Thus read the statute gives full effect to its obvious purposes and to the evident meaning of its words. To construe "first return" as meaning the first paper filed as a return, as dis- [fol. 33] tinguished from the paper containing a *timely amendment*, which, when filed is commonly known as the return for the year for which it is filed, is to defeat the purposes of the statute by dissociating the phrase from its context and from the legislative purpose in violation of the most elementary principles of statutory construction. [Italics supplied.]

As we read the Court's opinion it goes no farther than to say that an amended capital stock tax first taxable year return containing a revised capital stock valuation may be filed within the time lawfully prescribed for filing such return. Without such a limitation on the time for filing an amended return the purpose of the statute to have a definite and fixed declaration of value "for the first taxable year," as was recognized by the court, would be defeated, since the taxpayer might in any subsequent year submit an amended return declaring a different value.

In the circumstances here disclosed the refusal of the Commissioner to accept the amended return offered by the petitioner after expiration of the period for filing the return for the taxable year was not an abuse of his discretionary powers. Cf. Morrow, Becker & Ewing, Inc. v. Commissioner, 57 Fed. (2d) 1. The law under which the original return was filed was not a "new law," as in the cited case, and the petitioner had had ample notice of its rights and obligations under the statute.

Petitioner's contention is that the understatement of the value of its capital stock as disclosed in its original return was due to the error of its officers who prepared and signed the return. However that may be, the mistakes of its officers do not relieve the petitioner of the consequences of its failure [fol. 34] to comply with the law. See Pioneer Automobile

Service Co., 36 B. T. A. 213; George S. Groves, 38 B. T. A. 727.

The petitioner, having timely filed its capital stock tax return for the year ended June 30, 1936, and the period for filing such return for that year having expired on July 31, 1936, we are of the opinion that petitioner was not entitled to file an amended return changing the declaration of value contained in the original return.

Reviewed by the Board.

Decision will be entered under Rule 50.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1940

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

And afterwards, to wit, the 8th day of November, 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 31st day of January, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1940

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Petition to Review Decision of the United States Board of Tax Appeals

Opinion

(Filed January 31, 1941)

Before Biggs, Maris and Goodrich, Circuit Judges

Biggs, Circuit Judge:

In June, 1936 the petitioner's vice president in charge of tax matters, instructed its treasurer to make its capital

stock tax return as required by Section 105 of the Revenue Act of 1935, c. 829, 49 Stat. 1017, and to place upon its stock a value of $1,000,000. On July 29, 1936 the treasurer filed the return and by mistake placed a value of $600,000 upon the stock. When this error was discovered, a correct return was prepared declaring the value of the stock to be $1,000,000, and on September 3, 1936, which was after the time prescribed by the statute, an attempt was made to file this corrected return with the Collector of Internal Revenue who refused it.

The petitioner contends that the declaration attempted to be filed with the Collector upon September 3, 1936 was timely; that this was its true return which must serve as the basis for computing the excess profits tax imposed by Section 106 of the Revenue Act of 1935, 49 Stat. 1019.

The Supreme Court considered the nature of a similar return, one prescribed by Section 215 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 207, in the case of Haggar Co. v. Helvering, 308 U. S. 389. Mr. Justice Stone stated that the purpose of that statute was twofold: first, to allow the taxpayer itself to fix the base for the capital stock tax; second, to guard the revenue against loss by providing for an increase in the excess profits tax prescribed by Section 216 of the National Industrial Recovery Act in case of understatement as to the value of its capital stock by a taxpayer. In the cited case, the taxpayer had returned the value of its capital stock as $120,000, but within the time fixed for filing a return as extended by the Commissioner had attempted to file an amended return fixing the value of its stock at $250,000. The Commissioner refused to accept the amended tax return and assessed a deficiency. The Supreme Court held (p. 395) that the "first return" referred to in the statute meant the return "for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year." Mr. Justice Stone went on to say, "A timely amended return is as much a 'first return' for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year." Since the manifest purpose of the statute was served, the Supreme Court permitted the timely amendment of the Haggar Company to be filed and to stand as its capital stock tax return.

In the case of J. E. Riley Investment Company v. Commissioner, —— U. S. ——, the question of the timeliness of a return asserting statutory percentage depletion was before the Supreme Court. The statute involved was Section 114(b)(4) of the Revenue Act of 1934, 48 Stat. 680, and in construing it the Supreme Court held that a gold mining company which was unaware of the existence of the depletion allowance provision provided by Section 23(m), and for this reason did not assert percentage depletion in its first return could not be permitted to file an amended return over a year later in which it elected to take percentage depletion. The Supreme Court held that the later return was not a "first return" within the meaning of Section 114(b)(4), for that section requires the depletion allowance elected in the first return to be applicable not only for the taxable year for which the return was filed, but also for all subsequent taxable years. Referring to Haggar Company v. Helvering, Mr. Justice Douglas stated that the decision in that case "* * * would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a 'first return' within the meaning of Section 114(b)(4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return." Mr. Justice Douglas went on to say that the opportunity to choose the method of depreciation "* * * was afforded as a matter of legislative grace; the election [none the less] had to be made in the manner and in the time prescribed by Congress. The offer was liberal. But the method of its acceptance was restricted. The offer permitted an election only in an original return or in a timely amendment. An amendment for the purposes of Section 114(b)(4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative not a judicial function."

In the Riley Investment Company case the Supreme Court points out that it is not dealing with an amendment intended merely to correct errors or miscalculations of an original return and refers to Article 43-2 of Treasury Regulations 86 which allows amendments to permit a taxpayer

in a later taxable year to take advantage of a loss incurred in a prior taxable year. This might imply the possible conclusion that if the amendment sought to be filed by the Riley Investment Company had been designed merely to correct an error or miscalculation made in stating depletion percentage in the original return such an amendment would have been permitted. But Section 114(b)(4) of the Revenue Act of 1934 does not contain language in anywise similar to that contained in subsection (f) of Section 105 of the Revenue Act of 1935 which expressly provides that the declaration of value made in the first return cannot be amended.

We conclude therefore that the "first return" required by 105(f) is that return, original or amended, made for the first year in which the taxpayer exercises its privilege of fixing the value of its capital stock tax when filed within the time and only within the time prescribed by the statute. It follows that the petitioner's attempted amendment was not timely and therefore cannot serve as the return required by the statute.

Accordingly the decision of the Board of Tax Appeals is affirmed.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1940

No. 7509

WM. B. SCAIFE AND SONS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the

said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, January 31, 1941.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Affirming Decision of B. T. A. Received & Filed Jan. 31, 1941. Wm. P. Rowland, Clerk.

In the United States Circuit Court of Appeals for the Third Circuit

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Motion for Substitution of Name of Petitioner

The petitioner, representing to the Court that its name was changed effective January 1, 1941 from Wm. B. Scaife and Sons Company to Scaife Company by Articles of Amendment to its Articles of Incorporation (a certified copy whereof is submitted herewith), respectfully moves that its amended name, Scaife Company, be substituted in lieu of its former name, Wm. B. Scaife and Sons Company, in the title of this case.

Samuel Kaufman, Ruslander and Kaufman First National Bank Bldg., Pittsburgh, Pennsylvania, Counsel for Petitioner.

Filed April 10, 1941. Wm. P. Rowland, Clerk.

In the United States Circuit Court of Appeals for the Third Circuit

No. 7509

Wm. B. Scaife and Sons Company, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Coram: Biggs and Maris, Circuit Judges:

Upon consideration of the motion by counsel for petitioner this day filed,

It is Ordered that the name of petitioner in the above entitled cause be, and the same is hereby changed from Wm. B. Scaife and Sons Company to Scaife Company.

For the Court, John Biggs, Jr., Circuit Judge.

April 15, 1941.

Filed April 15, 1941. Wm. P. Rowland, Clerk.

United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Petitioner, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Wm. B. Scaife and Sons Company, petitioner, vs. Commissioner of Internal Revenue, respondent, No. 7509, the caption of the case now being changed to Scaife Company, petitioner, vs. Commissioner of Internal Revenue, respondent, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 16th day of April in the year of our Lord one thousand nine hundred and forty-one, and of the Independence of the United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 45,330. U. S. Circuit Court of Appeals, Third Circuit. Term No. 57. Scaife Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed April 23, 1941. Term No. 57, O. T., 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~981~~ 57

SCAIFE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SAMUEL KAUFMAN,
Counsel for Petitioner.

S. LEO RUSLANDER,
JAMES M. MAGEE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 981

SCAIFE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Supreme Court of the United States:

Scaife Company, the petitioner (whose name prior to January 1, 1941 was Wm. B. Scaife & Sons Company), respectfully presents this petition for review on writ of certiorari of a decision of the United States Circuit Court of Appeals for the Third Circuit.

Opinions Below.

The opinion of the Board of Tax Appeals is reported at 41 B. T. A. 278. The opinion of the Circuit Court of Appeals is reported at 115 F. (2d) 572.

Statement of the Matter Involved.

On July 29, 1936, there was filed on behalf of petitioner a Federal capital stock tax return for the year ended June

30, 1936 in which the declared value was by mistake stated in an amount ($600,000.00) lower than had been determined ($1,000,000.00) by the officers of petitioner who had charge of the matter. Immediately on discovery of the error on September 3, 1936 a correct return was prepared (declaring the higher amount) and lodged with the Collector accompanied by an explanation of the error and a remittance to cover the additional tax (Opinions below, R. 28 and 36; Exhibit A, R. 26).

The Collector refused to accept the corrected return for filing but transmitted it to the respondent as part of the record and returned to petitioner the amount which had been tendered in payment of the additional tax.

In a proceeding before the Board of Tax Appeals for redetermination of deficiencies in 1936 taxes which the respondent had asserted petitioner contended that its excess profits tax should be computed on the basis of the higher capital stock value declared in the corrected return. The Board of Tax Appeals concluded that petitioner was bound by the lower value stated in the return filed in July, 1936. The Board supported its conclusion with the argument (1) that an amended capital stock tax return filed after expiration of the unextended due date specified in Section 105(d) of the Revenue Act of 1935, 49 Stat. 1017, is not sufficiently timely to fall within the rule of the Supreme Court in *Haggar Co.* v. *Helvering*, 308 U. S. 389, and (2) that the mistakes of its officers do not relieve petitioner of the consequences of its failure to comply with the law (Opinion of the Board, R. 28).

On Review, the Circuit Court of Appeals affirmed the Board (R. 39-40), relying largely on the decision of the Supreme Court in *Riley Investment Co.* v. *Commissioner*, 311 U. S. 55. The Circuit Court of Appeals omitted any mention of the point urged by the petitioner (and discussed on brief by the respondent) to the effect that an amended re-

turn filed within the period to which the statute permitted an extension was timely within the rule of the *Haggar* case, even though the permitted extension had not been sought or obtained by the petitioner.

On March 24, 1941, the Circuit Court of Appeals for the Second Circuit held, in the case of *Lerner Stores Corporation* v. *Commissioner*, (not yet officially reported), that a clerical error in the declared value of the capital stock as stated in a timely return may be corrected by filing a late amended return, expressly disagreeing with the decision for review of which this petition is brought in the following statement at the conclusion of its Opinion:

> "A case in the Third Circuit, Wm. B. Scaife & Sons Co. *v.* Commissioner, * * * supports the ruling of the Board. For the reasons already stated we respectfully disagree with it."

Jurisdictional Basis.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (Title 28 Code of the Laws of the U. S., Section 347) to review the decision of the United States Circuit Court of Appeals for the Third Circuit entered on January 31, 1941.

The Questions Presented.

1. Whether the term "first return" as used in Section 105(f) of the Revenue Act of 1935 (c. 289, 49 Stat. 1017) includes an amended capital stock tax return filed beyond the unextended due date but before expiration of the period for which the Commissioner was empowered by the Statute (Section 105(d)) to grant an extension.

2. In the alternative, whether a declaration of value stated by mistake on a timely "first return" in an amount lower than previously determined by the taxpayer's officers, may be superseded by the correct declaration of value made in a late amended return filed promptly after discovery of the error.

Reasons Relied On for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Third Circuit in the present case is in direct conflict with a decision of the Circuit Court of Appeals for the Second Circuit (*Lerner Stores Corporation* v. *Commissioner*, decided March 24, 1941 and not yet officially reported), where the Court stated in its Opinion:

> "A case in the Third Circuit, Wm. B. Scaife & Sons Co. *v.* Commissioner, * * * supports the ruling of the Board. For the reasons already stated we respectfully disagree with it."

2. The decisions of the Supreme Court in *Haggar Co.* v. *Helvering*, 308 U. S. 389 and *Riley Co.* v. *Commissioner*, 311 U. S. 55, have not removed uncertainty on the important questions involved in this case, which should be settled by the Court. The amended return in the *Haggar* case, which was held to be timely, was filed before expiration of the extended due date. The amended return in the *Riley* case, which was held to be untimely, was filed after expiration of the statutory period for which the Commissioner was empowered to grant an extension. Neither case involved a mistake of fact in preparation of the first return, found in the present case and in the *Lerner* case by the Board and the Courts below.

WHEREFORE, it is respectfully submitted that the Supreme Court should grant this petition for review on writ of certiorari of the decision of the Circuit Court of Appeals for the Third Circuit.

SAMUEL KAUFMAN,
Pittsburgh, Pa.,
Counsel for Petitioner.

S. LEO RUSLANDER,
JAMES M. MAGEE, S. K.,
Of Counsel.

APPENDIX.

Revenue Act of 1935, c. 829, 49 Stat. 1017.

Sec. 105. Capital Stock Tax.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, insofar as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). * * *.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 57

SCAIFE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

SAMUEL KAUFMAN,
Counsel for Petitioner.

S. LEO RUSLANDER,
JAMES M. MAGEE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 57

SCAIFE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Board of Tax Appeals is reported at 41 B. T. A. 278. The opinion of the Circuit Court of Appeals is reported at 115 F. (2d) 572.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (Title 28, Code of the Laws of the U. S., Section 347) to review the decision of the United States Circuit Court of Appeals for the Third Circuit entered on January 31, 1941.

Statement of the Case.

On July 29, 1936, there was filed on behalf of petitioner a Federal capital stock tax return for the year ended June

30, 1936, in which the declared value was by mistake stated in an amount ($600,000.00) lower than had been determined ($1,000,000.00) by the officers of petitioner who had charge of the matter. Immediately on discovery of the error on September 3, 1936 a correct return was prepared (declaring the higher amount) and lodged with the Collector accompanied by an explanation of the error and a remittance to cover the additional tax (Opinions below, R. 19 and 25; Exhibit A, R. 17).

The Collector refused to accept the corrected return for filing but transmitted it to the respondent as part of the record and returned to petitioner the amount which had been tendered in payment of the additional tax (R. 20).

In a proceeding before the Board of Tax Appeals for redetermination of deficiencies in 1936 taxes which the respondent had asserted, petitioner contended that its excess profits tax should be computed on the basis of the higher capital stock value declared in the corrected return. The Board of Tax Appeals concluded that petitioner was bound by the lower value stated in the return filed in July, 1936. The Board supported its conclusion with the argument (1) that an amended capital stock tax return filed after expiration of the unextended due date specified in Section 105(d) of the Revenue Act of 1935, 49 Stat. 1017, is not sufficiently timely to fall within the rule of the Supreme Court in *Haggar Co.* v. *Helvering*, 308 U. S. 389, and (2) that the mistakes of its officers do not relieve petitioner of the consequences of its failure to comply with the law (Opinion of the Board, R. 19).

On Review, the Circuit Court of Appeals affirmed the Board (R. 28-29), relying largely on the decision of the Supreme Court in *Riley Investment Co.* v. *Commissioner*, 311 U. S. 55. The Circuit Court of Appeals omitted any mention of the point urged by the petitioner (and discussed on brief by the respondent) to the effect that an

amended return filed within the period to which the statute permitted an extension was timely within the rule of the *Haggar* case, even though the permitted extension had not been sought or obtained by the petitioner.

Specification of Errors.

The court below and the Board of Tax Appeals erred in failing to hold that:

1. The term "first return" as used in Section 105(f) of the Revenue Act of 1935 (c. 829, 49 Stat. 1017) includes an amended capital stock tax return filed beyond the unextended due date but before expiration of the period for which the Commissioner was empowered by the Statute (Section 105(d)) to grant an extension.

2. A declaration of value stated by mistake on a timely "first return" in an amount lower than previously determined by the taxpayer's officers, may be superseded by the correct declaration of value made in a late amended return filed promptly after discovery of the error.

Summary of Argument.

Under the decision of the Supreme Court in *Haggar Co. v. Helvering*, 308 U. S. 389, the phrase "first return" as used in Section 105(f) of the Revenue Act of 1935 (c. 829, 49 Stat. 1017) includes a timely amended return. An amended return is timely when filed beyond the unextended due date but before expiration of the statutory sixty-day extension. This rule is particularly applicable where, as here, the declaration of value previously (admittedly timely) filed was by mistake stated in an amount lower than had been determined by the taxpayer's officers and the amended return was filed promptly after discovery of the error.

ARGUMENT.

Determination of the petitioner's liability for excess profits tax for the year 1936 depends upon the amount of the declared value of its capital stock for the year ending June 30, 1936. It is petitioner's contention that the declared value was the $1,000,000.00 shown in the return filed September 3, 1936, and not the $600,000.00 shown on the return filed July 29, 1936.

The Declaration of $1,000,000.00 Filed September 3, 1936 Was "Timely".

The decision of the Supreme Court in *Haggar Co.* v. *Helvering*, 308 U. S. 389, held to be timely a revised declaration of value offered before expiration of the *extended* due date, but it does not follow as concluded by the Board and the court below that a revised declaration offered after an unextended due date is "untimely."

The Circuit Court of Appeals grounded its conclusion on the decision of the Supreme Court in *J. E. Riley Investment Company* v. *Commissioner*, 311 U. S. 55. In that case, however, the amended return was filed more than eleven months after the original due date, and the opinion of the Supreme Court pointed to the fact that the statute permitted an extension for not exceeding six months.

In the present case, the return was due July 31, 1936, but the statute empowered the Commissioner to grant an extension not exceeding sixty days. The original return was filed July 29, 1936 and the amended return was filed September 3, 1936, less than sixty days later.

The nexus of petitioner's argument is that the statutory period for filing the first return includes not only the "one month after the close of the year" but also the additional sixty days for which the Commissioner was empowered to extend the filing time. This position finds inferential basis

in the following paragraph from the opinion in the *Riley* case, by Mr. Justice Douglas:

> "We think that petitioner's amended return, filed on March 3, 1936, was not a 'first return' within the meaning of Sec. 114(b)(4). By Sec. 53(a)(1) of the 1934 Act, the return was due on or before March 15, 1935. By Sec. 53(a)(2) *the Commissioner was empowered to grant a reasonable extension for filing returns* but, so far as applicable here, *not exceeding six months.* Haggar Co. *v.* Helvering, 308 U.S. 389, would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a 'first return' within the meaning of Sec. 114(b)(4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return." (Emphasis supplied.)

In the *Haggar* case, as well as in *Glenn* v. *Oertel Co.*, 97 F. (2d) 495, and *Philadelphia Brewing Co.* v. *U. S.*, 27 Fed. Supp. 583 (both cited with approval by the Supreme Court in the *Haggar* case) corrected returns filed in September, 1933 were held to be timely. The only difference from the present case is that in 1933 the Commissioner of Internal Revenue had granted an extension to September 29 as permitted by the Statute, whereas petitioner did not avail itself of its right to obtain an extension to September 29, 1936 as provided in the Statute and in Article 37 of Regulations 64. This difference is not substantial enough to make petitioner's return filed September 3 untimely, returns in two of the cited cases having been filed on later dates in September.

The respondent's insistence upon compliance with the Regulations as a prerequisite to inclusion, in the statutory period for filing, of the statutory extension period is like-

wise without substance. In the court below he argued that if he proceeded along the lines of petitioner's contention "the due date of all capital stock returns would be automatically postponed for another sixty days directly contrary to the statute and regulations."

This argument disregards the distinction between the timeliness of an original return and the timeliness of an amended return. The extreme result of petitioner's contention would simply be that the due date of all amended capital stock returns would be automatically postponed for another sixty days. Such a construction would not be contrary to the statute and the regulations.

The statute and the regulations are adequately served by the penalty provisions which would be enforced in those cases where the taxpayers failed to file returns within the thirty-day period without first obtaining extensions.

The respondent has recently given recognition to the interrelationship of the penalty provisions and the extension provisions of the statute in T.D. 5069, promulgated September 24, 1941 under the Revenue Act of 1941, which provides in Section 301(c) with reference to capital stock tax returns for the year ending June 30, 1941 that "the extension may be for not more than ninety days." In granting a general extension to all taxpayers it is provided in the Treasury Decision that "the period within which returns of capital stock tax for the year ended June 30, 1941, *may be filed without assertion of penalties for delinquency*, as extended to September 29, 1941, by Treasury Decision 5061, approved July 21, 1941, is hereby further extended to October 29, 1941."

In the view which petitioner urges as the proper construction of the statute, if such a general extension were not granted, taxpayers who had filed returns prior to September 29, 1941 could, nevertheless, have filed amended returns to October 29, 1941, but taxpayers who had not

filed in September (or prior) would be subject to penalties for delinquency upon their filings in October.

In short, taxpayers may universally file their original declarations of value by original or amended returns at any time within the statutory period including the period for which an extension is permitted, but those taxpayers who neither file a return nor obtain an extension before expiration of the unextended due date will be subject to the penalties for delinquency.

The Declaration of $600,000.00 Must Be Ignored.

It is petitioner's alternative contention that, if taxpayers may not universally amend their capital stock tax returns at any time within the statutory extension period, the correct declaration of value made to supersede a mistake on a timely "first return" must be regarded as the original declaration.

The fact is uncontroverted that petitioner intended and determined prior to July 29, 1936 to declare $1,000,000.00 as the declared value of its capital stock, so that the amount of $600,000.00 erroneously inserted in the return filed July 29, 1936 was not petitioner's declaration of value.

The question here involved is identical with the question in the case of *Lerner Stores Corporation v. Commissioner*, 118 F. (2d) 455, in which certiorari was recently granted by the Supreme Court. Paraphrasing the essence of the opinion of the Circuit Court of Appeals in the *Lerner* case, the present case does not involve a change of judgment by the petitioner but presents a situation where the taxpayer has made but one declaration of value and has inaccurately reported it to the Commissioner due to an error of one of its officers. The correction of such an error cannot thwart the purposes of the statute or injure the interests of the Government.

While the mistake in the *Lerner* case involved a clerical mistake in misplacing a decimal and the Court there stated that "strict proof should be required to establish that the value stated in a return resulted from a clerical mistake," the mistake in the present case involved with equal clarity no change of judgment by the taxpayer. The petitioner has met the burden of proving an error and the Court below found that the value of $600,000.00 was declared by mistake and that the error was attempted to be corrected promptly after its discovery (R. 26).

Conclusion.

If the petitioner be not permitted to have its excess profits tax liability determined on the basis of the declared value of $1,000,000.00, which was the amount which petitioner at all times material intended to declare, petitioner will, in the language of the Supreme Court in *Haggar Co.* v. *Helvering* "have been denied an opportunity to make a declaration of capital stock value which it was the obvious purpose of the statute to give * * * for no other reason than that the declaration appeared on an amended instead of an unamended return * * *. The words of the statute, fairly read in the light of the purpose, disclosed by its own terms, require no such harsh and incongruous result."

Respectfully submitted,

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Pittsburgh, Pa.,
Counsel for Petitioner.

S. LEO RUSLANDER,
JAMES M. MAGEE,
Of Counsel.

APPENDIX.

Revenue Act of 1935, c. 829, 49 Stat. 1014, as amended:

SEC. 105. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.00 for each $1,000 of the adjusted declared value of its capital stock.

* * * * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, insofar as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). * * *

Treasury Regulations 64, promulgated under the Revenue Act of 1935:

ART. 37. *Time for filing return.*—(a) *General.* Returns must be filed with the collector of the district in which is located the principal place of business of the corporation, or, if it has no principal place of business in the United States, then with the collector at Baltimore, Md., during the month of July next following the end of such year, unless the time for filing is officially extended.

* * * * * * *

(b) *Extensions of time.*—The Act authorizes the Commissioner to extend, under such rules and regulations as he may prescribe with the approval of the Secretary, the time for filing returns and paying taxes, subject to the limitation that no such extension shall be for more than 60 days. Pursuant thereto, the respective collectors of internal revenue are hereby authorized to grant, under the conditions prescribed herein, extensions of time for filing capital stock tax returns and for payment of such taxes. In the exercise of such authority, collectors of internal revenue shall grant an extension of time for filing the return and paying the tax, only: (1) upon a written application under oath filed on or before the statutory due date of the return and showing reasonable cause for the extension; (2) for such reasonable period as may be required by the circumstances, not to extend in any case beyond the 29th day of September next following the close of the taxable

year; (3) with the provision that interest at the rate of 6 per cent per annum shall be paid upon the tax from the statutory due date (July 31) to the date of payment of the tax; and (4) in accordance with such procedure as may be prescribed from time to time by the Commissioner. The determination whether an application presents reasonable cause for an extension depends upon the particular circumstances of each case. Ordinarily, a showing of sickness or absence of the officers charged with the responsibility of making the return, or of other circumstances beyond the control of the corporation which prevent the filing of a proper return within the time required by law, constitutes reasonable cause warranting an extension. Accordingly, a corporation desiring an extension of time for filing its capital stock tax return and paying the tax must file with the collector on or before the statutory due date of the return an application under oath setting forth the reasons necessitating an extension and stating the time for which the extension is requested. In every case in which an extension is allowed, a copy of the collector's letter granting the extension shall be attached to the return when filed. For general provisions relating to penalties and interest, see article 82.

* * * * * * *

ART. 82. *Penalties and interest.*—The Act provides that if the tax is not paid when due there shall be added, as part of the tax, interest at the rate of 6 per cent per annum from the time when the tax became due until paid. The due date of the tax is the last day of July next following the close of the taxable year. If payment is deferred beyond the due date interest will accrue from that date irrespective of the reason for the delay in payment and whether or not the time for filing the return has been extended.

Failure to file a return on or before the last day of July next following the close of the taxable year, or in case an extension has been granted, before the expiration of the period of extension, causes to accrue the following graduated scale of penalties: 5 per cent of the amount of the tax if the failure is for not more than 30 days, with an addi-

tional 5 per cent for each additional 30 days, or fraction thereof, during which failure continues. Such penalties may not, however, exceed 25 per cent in the aggregate. When it is shown that the failure to file was due to a reasonable cause and not to willful neglect, no such addition to the tax shall be made.

In addition to such interest and penalties, liability for penalties is incurred under provisions of law applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926, which penalties are also specifically made applicable in respect of taxes imposed by section 105 of the Revenue Act of 1935, in so far as not inconsistent with the latter section.

If an assessment is made of tax, penalty, or interest, and payment is not made within 10 days after the date of issuance of Form 17 (First notice and demand) based on assessment approved by the Commissioner, there will accrue a penalty of 5 per cent of the total assessment, and interest at the rate of 6 per cent per annum upon the entire assessment from ten days after issuance of Form 17 until date of payment.

If a false or fraudulent return be willfully made, the penalty under section 3176 of the United States Revised Statutes, as amended, is 50 per cent of the total tax due for the entire period involved including any tax previously paid.

Under section 1114 of the Revenue Act of 1926, any corporation which wilfully fails to pay any tax due, file a return, or keep records, or attempts in any manner to evade or defeat the tax, is subject to a fine of $10,000, or imprisonment, or both, with costs of prosecution. For willful failure to pay, or a willful attempt in any manner to evade or defeat the tax, the statute also imposes a penalty equal to the amount of the tax not paid, which penalty is assessable in the same manner as the tax. These penalties apply to an officer or employee who, as such officer or employee, is under a duty to perform the act in respect of which the violation occurs.

No. ~~984~~ 57

In the Supreme Court of the United States

OCTOBER TERM, 1940

SCAIFE COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 981

SCAIFE COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The Circuit Court of Appeals for the Second Circuit, in its opinion in *Lerner Stores Corp.* v. *Commissioner,* 118 F. (2d) 455, indicated its view that its decision in the *Lerner* case was in conflict with the decision below in the present case. In the light of this statement, it is apparent that the Circuit Court of Appeals for the Second Circuit would decide the present case otherwise than it was decided below, and that to that extent a conflict of decisions exists. However, the two cases are distinguishable. In the *Lerner* case, the error in de-

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claring the value was the result of a clerical mistake made by an employee of the taxpayer. Here, on the other hand, the value originally declared was determined in the first instance by the treasurer of the company, in the exercise of his judgment, and the error, far from being a clerical mistake, lay in the inadvertent disregard by the treasurer of the vice president's instructions.

The decision below that a return, so filed, may not be amended after the time for filing the original return has expired appears to be clearly correct under the principle established in *J. E. Riley Investment Co.* v. *Commissioner,* 311 U. S. 55. Moreover, since the issue is not one of great importance, we feel that this Court would be justified, despite the apparent conflict of views of the Second and Third Circuits, in denying the requested writ.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MAY 1941.

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No. 57

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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 19–24) is reported in 41 B. T. A. 278. The opinion of the Circuit Court of Appeals (R. 25–28) is reported in 117 F. (2d) 572.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1941 (R. 28–29). The

petition for a writ of certiorari was filed April 23, 1941, and was granted June 2, 1941 (R. 31). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer filed a timely capital stock tax return, prepared by its treasurer and signed by its president, in which the capital stock was declared at a value lower than the value which the vice-president had instructed the treasurer to declare. The question is whether, after the period for filing the original return had expired, taxpayer was entitled to file an amended return changing the value to that which the vice-president had determined should be declared.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 23–28.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 19–20), may be summarized as follows:

On July 29, 1936, taxpayer filed its federal capital stock tax return for the period ended June 30, 1936. This return was prepared by the taxpayer's treasurer and was signed by its president, J. V. Scaife. Early in September, 1936, it came to the attention of taxpayer's officers that in the prepara-

tion of the return the treasurer had declared a capital stock valuation of $600,000, whereas he had been instructed by the vice-president, A. M. Scaife, to report a declared capital stock valuation of $1,000,000. Taxpayer's president, who signed the return, did not examine it carefully and was not aware of the fact that the lower capital stock valuation of $600,000 had been declared. (R. 19.)

On September 3, 1936, after the time for filing capital stock returns had expired, the taxpayer attempted to file an amended return, in which the declared value of its capital stock was stated at $1,000,000. It tendered its remittance in the amount of $400 to the Collector to cover the additional capital stock tax computed on that basis (R. 17–18). The Collector refused to accept the amended capital stock return for filing and returned the $400 to the taxpayer (R. 19–20).[1]

The taxpayer then filed a petition with the Board of Tax Appeals for a redetermination of income and excess profits taxes for the year 1936, claiming that the excess profits tax should be computed on the basis of a declared value for its

[1] On November 24, 1936, the taxpayer instituted an action in the District Court seeking to enjoin the Collector from refusing to receive and accept the amended return and substitute it for the original return previously filed. Relief was denied by the District Court (18 F. Supp. 748) and its decision was affirmed by the Circuit Court of Appeals for the Third Circuit. 94 F. (2d) 664. Certiorari was denied by this Court. 305 U. S. 603. (R. 20.)

capital stock of $1,000,000. Taxpayer alleged that it was entitled to rely on the value declared in the amended return because of the mistake made in the original return and that the Commissioner had erred in refusing to allow the value of $1,000,000 declared in the amended return (R. 19).[2] The Board sustained the action of the Commissioner (R. 18) and the court below affirmed (R. 28–29).

SUMMARY OF ARGUMENT

Section 105 (f) of the Revenue Act of 1935 provides that the adjusted declared value of the taxpayer's capital stock shall be the value as declared by the taxpayer in its "first return"; it further provides that the value so declared "cannot be amended". Under these provisions it is clear that, after the statutory period for filing returns has expired, the value declared in the return then on file becomes final and cannot subsequently be altered. The statute so states, the applicable Treasury Regulations so provide, and this Court so held in *Riley Co.* v. *Commissioner,* 311 U. S. 55 in construing a comparable provision of the Revenue Act.

No valid distinction can be drawn between the *Riley* case and the present one on the ground that, although the amended return here was not filed within the statutory period for filing original re-

[2] Another issue was settled by stipulation (R. 19) and is not involved here.

turns, it was filed within 60 days thereafter. Although Congress has conferred upon the Commissioner power to extend the time for filing returns for not more than 60 days under such rules and regulations as he may prescribe, in this case no extension was either sought or granted. Plainly, the existence of the power to grant an extension does not of itself extend the statutory period where the power is neither invoked nor exercised.

The *Riley* case may also not be distinguished on the ground that the purpose of the amendment here was to correct a "mistake." The rationale of the *Riley* decision is that there is no statutory sanction for any amendment after the time for filing original returns has expired. This is equally true where the amendment is sought to be filed to correct a "mistake" as where it is sought to be filed for any other purpose. In either case, acceptance of the amendment would "extend the time beyond the limits prescribed in the Act", which is "a legislative, not a judicial, function." 311 U. S. at 59. Furthermore, the taxpayer's argument in the *Riley* case was essentially the same as petitioner's argument here, namely, that the original return failed to reflect the taxpayer's real desires because of a mistake and that only by allowing the amendment to be filed would the true choice of the taxpayer be shown. The *Riley* case is, if anything, a stronger one for the tax-

payer, for the mistake here is more directly traceable to the negligence of the taxpayer's own officers.

Although the construction of Section 105 (f) for which we contend may involve hardship for some taxpayers, this consideration is not, as this Court pointed out in the *Riley* case, "ground for relief by the courts from the rigors of the statutory choice which Congress has provided". 311 U. S. at 59. In any event, the equitable considerations which may favor the taxpayer must be weighed against the administrative difficulties which would be occasioned if its position were sustained. Already, despite the strict language of the statute and the regulations, and despite the Bureau's consistent policy of denying all claims of amendment, there have been at least 200 cases involving amended returns seeking to change the declaration of value in the original return on grounds of mistake. A decision in this case favorable to the taxpayer would obviously cause the number of such amendments to multiply rapidly. The gates would then be open to the unscrupulous taxpayer to juggle its declaration of value in the light of hindsight in order to obtain the lowest possible combination of capital stock and excess profits taxes.

The danger in this situation would be aggravated both by the fact that there would be no precise limitation upon the time within which an

amended return might be filed and by the practical impossibility of verifying the taxpayer's claim of mistake in the original return. There is no such thing as a "correct" declaration of value in the usual meaning of the word, since the value to be declared depends exclusively upon the discretion of the taxpayer and has no relation to actual facts. The single question which would confront the Commissioner in every case of alleged mistake, therefore, would be whether or not the value actually declared was the value which the taxpayer's officers intended to declare—in other words, the ultimate issue in every case would be the good faith of the taxpayer.

ARGUMENT

AFTER THE EXPIRATION OF THE TIME FOR FILING CAPITAL STOCK TAX RETURNS, A TAXPAYER MAY NOT FILE AN AMENDED RETURN CHANGING THE VALUE DECLARED FOR ITS CAPITAL STOCK IN ITS ORIGINAL RETURN.

The court below held that the Collector had properly refused to accept the amended return tendered after the statutory period for filing returns had expired and that consequently the taxpayer's excess profits tax liability had been properly computed upon the basis of the declaration of value in the original return. It further held that the fact that taxpayer's treasurer had overlooked or disregarded the vice-president's in-

structions in declaring the value at $600,000 instead of at $1,000,000 was not relevant in determining whether, under the statute, an amended return can be filed after the statutory period for the purpose of changing the declaration of value. This decision, we believe, is clearly correct under the express terms of the statute and the controlling decision of this Court in *Riley Co.* v. *Commissioner*, 311 U. S. 55.

The relevant provision of the capital stock tax law is Section 105 (f) of the Revenue Act of 1935, which provides as follows:

> For the first year ending June 30, in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (*which declaration of value cannot be amended*), * * *. [Italics supplied.]

The statute is unambiguous. The value to be used is the value declared by the taxpayer in its first return; the first return, as this Court held in *Haggar Co.* v. *Helvering*, 308 U. S. 389, is the return for the first year, as amended by the taxpayer within the period for filing the original return. But once the period for filing original returns has expired, the value declared in the return then on file becomes final and "cannot be amended". The statute explicitly so declares and

it has been so construed in the Treasury Regulations, *infra*, pp. 26–27.

Even if the statute did not contain any prohibition against amending the declaration of value but simply provided that the adjusted declared value should be the value as declared in the taxpayer's first return, the taxpayer would not be entitled to change its declaration of value after the period for filing original returns had expired. This Court so held in *Riley Co.* v. *Commissioner, supra.* That conclusion is compelled even more strongly where, as here, the statute specifically provides that no amendment shall be allowed.

The *Riley* case, we believe, is decisive of the present one. The statutory provision there involved was Section 114 (b) (4) of the Revenue Act of 1934 (48 Stat. 680) allowing percentage depletion for 1934 and all subsequent years if, but only if, the taxpayer in its first return made an election to compute depletion upon the percentage basis. The taxpayer failed to elect percentage depletion in its original return because, due to its remote location in Alaska, it had no knowledge of the new opportunity afforded by the 1934 Act to make such an election and was compelled to use a form return for an earlier year. After the time for filing the original return had expired, the taxpayer sought to file an amended return in which it elected to compute depletion on the percentage basis. This Court held that the Commissioner had properly

refused to accept the amended return, saying (pp. 58–59):

> * * * An amendment for the purposes of § 114 (b) (4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative, not a judicial function.
>
> Strong practical considerations support this position.
>
> If petitioner's view were adopted, taxpayers with the benefit of hindsight could shift from one basis of depletion to another in light of developments subsequent to their original choice. It seems clear that Congress provided that the election must be made once and for all in the first return in order to avoid any such shifts. And to require the administrative branch to extend the time for filing on a showing of cause for delay would be to vest in it discretion which the Congress did not see fit to delegate.
>
> Petitioner urges that this result will produce a hardship here. It stresses the fact that it had no actual knowledge of the new opportunity afforded it by § 114 (b) (4) of the 1934 Act and that equitable considerations should therefore govern. That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

No valid distinction can be drawn between the *Riley* case and the present one on the ground that, although the amended return here was not filed within the statutory period for filing original returns, it was filed within 60 days thereafter. It is true that Congress has conferred upon the Commissioner power to extend the time for filing returns, under such rules and regulations as he may prescribe, for a period of not more than 60 days after the expiration of the statutory date (Section 105 (d), *infra*, p. 23). In this case, however, no extension was either sought or granted. Plainly the existence of a power to grant an extension does not of itself extend the statutory period where the power is neither invoked nor exercised. Furthermore, the grant of an extension is by no means an automatic act. The Commissioner has issued regulations which set forth certain definite conditions which must be met before an extension will be allowed, including the filing of a written application and a showing that something beyond the control of the taxpayer prevented the filing of a timely return. Treasury Regulations 64 (1936 Ed.), Article 37 (b). None of the conditions set forth in the regulations have been satisfied by the taxpayer here.[3]

There is also no merit in the taxpayer's attempt

[3] It should be noted that in *Helvering* v. *Lerner Stores Corp.*, No. 248, present Term, with which the present case is to be argued, the amendment was filed more than 60 days after the statutory date.

to distinguish the *Riley* case on the ground that the purpose of the amendment here was to correct a "mistake".[4] The rationale of the *Riley* decision, as the passage quoted above reveals, is that there is no statutory sanction for any amendment after the time for filing original returns has expired. This is equally true where the amendment is sought to be filed to correct a "mistake" as where it is sought to be filed for any other purpose. In either case, acceptance of the amendment would "extend the time beyond the limits prescribed in the Act", which is "a legislative, not a judicial, function."

Furthermore, the taxpayer's argument in the *Riley* case was essentially the same as petitioner's argument here, namely, that the original return failed to reflect the taxpayer's real desires because of a mistake[5] and that only by allowing the amend-

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[4] Throughout the testimony, the treasurer's error is called a mistake in overlooking, or ignoring, the vice-president's directions (R. 4, 12, 18, 19). However, whether the treasurer consciously disregarded the vice president's instructions is not definitely ascertainable from the evidence.

[5] As the opinion of this Court discloses (311 U. S. at 56), certiorari was granted in the *Riley* case to resolve a conflict with *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388 (C. C. A. 4). In the *Mead* case, the court said (pp. 390-391): "When we consider the fact that in its return for the year 1933 the taxpayer had elected to claim depletion for succeeding taxable years as provided in the Revenue Act of 1932; that at the time of filing its initial return for the year 1934 it had no knowledge that its election to claim depletion on a percentage basis was required to be repeated; that

ment to be filed would the true choice of the taxpayer be shown. The difference in the types of "mistake" in the two cases is not material. In the *Riley* case a proper election of depletion would have been made if adequate information had been available; in this case, the information was available but the treasurer failed to follow the vice-president's instructions. The *Riley* case is, if anything, the stronger one for the taxpayer, for the mistake here is more directly traceable to the negligence of the taxpayer's own officers.

It is true, as we pointed out in our brief in the *Riley* case (Br. for Resp. No. 50, October Term 1940, p. 17), that the Commissioner, because of his duty to assure that net income is correctly reported and the tax thereon correctly computed, has frequently accepted, and occasionally required, amended returns truly reflecting items of income and deductions which were misreported in the original return. The opinion of the Court in the *Riley* case adverts to this administrative practice, stating (311 U. S. at 58):

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the printed form for the 1934 return contained no notice that a new election was required; *and that by its amended return it endeavored to correct the mistake, stating that it had been made 'through inadvertence'*, we are forced to the conclusion that in all fairness, and certainly fairness is to be expected from a government in dealing with its taxpayers, the amendment to the return should have been allowed. In rejecting the amendment the Commissioner was in error." [Italics supplied.] Cf. *Lucas* v. *Sterling Oil & Gas Co.*, 62 F. (2d) 951 (C. C. A. 6).

> We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns.* This, however, is not a case where a taxpayer is merely demanding a correct computation of his tax for a prior year based on facts as they existed. * * *
>
> * See, for example, Treasury Regulations No. 86, Art. 43-2, governing the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year. Cf. *Union Metal Mfg. Co.*, 1 B. T. A. 395.

It was on the basis of this statement, *inter alia*, that the Circuit Court of Appeals for the Second Circuit in *Lerner Stores Corp.* v. *Commissioner*, 118 F. (2d) 455, now pending on writ of certiorari, No. 248, this Term—a case to be argued immediately following the present one—held that the value declared in the original return can be changed by amendment filed after the statutory period if the value first declared was included in the original return by mistake.

We believe it clear that the *Lerner* decision finds no support in the passage which we have quoted from the *Riley* opinion. Examination of this passage, and particularly of the regulations and the decision referred to in the accompanying footnote, plainly indicates that this Court was considering the administrative practice referred to in

our brief of accepting amended returns where the facts presented in the original return differed from the true facts with respect to the amount of the taxpayer's income or his right to deductions. The Treasury Regulations cited (Regulations 86, Art. 43–2) govern the filing of amended returns for the purpose of deducting losses which were actually sustained during a prior taxable year. The prefatory sentence of the article stresses that taxpayers are expected to make every reasonable effort to *ascertain the facts* necessary to make a correct return.

Here, on the other hand, we are not concerned with an actual error or inaccuracy in the facts. A declaration of value for capital stock tax purposes is never true or untrue. See *Chicago Telephone Supply Co.* v. *United States*, 23 F. (2d) 471, 474–475 (C. Cls.), certiorari denied 305 U. S. 628. This is so because the taxpayer is allowed to declare any value it chooses for its capital stock, accurate or arbitrary, and its determination is not subject to review by the Commissioner or the courts. The only check upon the taxpayer's exercise of discretion is the practical one that the value declared is used, not only to compute the capital stock tax, but also to compute the related excess profits tax; a low declaration of value, while decreasing the capital stock tax, increases the risk of a high excess profits tax. Since the statute specifically provides that the declaration of value in

the first return may not be amended but shall govern all subsequent years, the risk of having to pay a high excess profits tax provides an effective check to any inclination of the taxpayer to declare an unduly low value in order to decrease its capital stock tax.[8]

In view of the fact that, under this statutory scheme, a declaration of value is never erroneous or inaccurate, the administrative practice, referred to with apparent approval in the *Riley* case, of

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[8] The purpose of this statutory scheme was to avoid controversy over the actual value of the capital stock. The earlier Revenue Acts had imposed a tax on the capital stock of the corporation measured by "the fair average value of its capital stock." Revenue Act of 1918, Section 1000 (c. 18, 40 Stat. 1057). However, so much administrative difficulty was experienced in the attempt to arrive at the actual value of capital stock that the tax was repealed in 1926. See S. Rep. No. 52, 69th Cong., 1st sess., pp. 11–12; see also the discussion of this tax in 1 Bonbright, *Valuation of Property*, pp. 577–595.

When the present capital stock tax was enacted in the National Industrial Recovery Act, the Senate Committee explained the changes from the earlier law as follows (S. Rep. No. 114, 73d Cong., 1st sess., p. 6): "In order to avoid controversy as to the value of the capital stock, the tax is imposed on the value declared by the corporation. A reasonable value is, however, assured by means of an excess profits tax imposed by Section 215 and based on the relation of the net income of the corporation to such declared value. A value for the capital stock once having been declared, such value may not be subsequently changed except for bona fide changes in the capital structure." See also S. Rep. No. 588, 73d Cong., 2d sess., p. 5, recommending the passage of the capital stock and excess profits tax provisions of the Revenue Act of 1934.

allowing amended returns in order truly to reflect items of income or deductions misreported in the original return is plainly irrelevant. Moreover, even if the administrative practice were relevant, it could clearly not override the explicit direction of Congress in Section 105 (f) that no amendment of the declaration of value shall be allowed. In none of the instances where the Commissioner has permitted the filing of an amended return to correct a mistake was there any similar statutory prohibition.

Strong support for our position is furnished by the action of Congress in passing Private Act No. 199, c. 440, 50 Stat. 1014. This was a private act enacted for the relief of the Jackson Casket and Manufacturing Company. Because of a mistake made by the Western Union Telegraph Company in transmitting a message from the president of the casket company to its cashier, the cashier filed a capital stock tax return in which the value of the capital stock was declared at $175 per share instead of at $125 per share as the message from the president had directed. The statute enacted for the relief of the company provided that, notwithstanding the declaration of value in the original return, the declared value of the stock should be computed on the basis of $125 per share. In reporting the bill favorably, both the Senate and the House Committees stated that the company would secure no refund of its capital stock tax

for the year 1936 as a result of the error on the part of Western Union and that the statute merely made an adjustment for subsequent years. See H. Rep. No. 777, 75th Cong., 1st sess.; S. Rep. No. 730, 75th Cong., 1st sess. The enactment of this special legislation clearly indicates that Congress believes that taxpayers cannot amend their first return without the aid of legislation—in other words, that Section 105 (f) is to be construed as written and that no exception is to be made even when an actual hardship is imposed on the taxpayer through no fault of its own.

The opposite conclusion reached by the Second Circuit in the *Lerner Stores* case, *supra*, is based upon a distinction drawn by the court between an amendment designed to reflect a change of judgment by the taxpayer and an amendment designed to correct a mistake in reflecting the taxpayer's original judgment; the *Riley* case was considered to stand only for the proposition that the first type of amendment is precluded. 118 F. (2d) at 457–458. Apparently the rationale is that the declaration of value referred to in the statute is the value which the taxpayer *intends to declare*, rather than the value which it *actually declares*, in its first return. This view finds no warrant whatever in the terms of the statute. The figure set down in the first return is clearly the declaration referred to, regardless of the taxpayer's subjective intention, for otherwise the words "declared" and "declaration"

would have no meaning. In fact, if the taxpayer's unexpressed determination of value, rather than its actual declaration of value, were the decisive factor, the statute would be completely unworkable.

It is true, of course, that the construction of Section 105 (f) for which we contend may involve hardship for some taxpayers; indeed this seems the explanation for the result reached by the Second Circuit in the *Lerner* case.[7] But, as this Court pointed out in the *Riley* case where the hardship to the taxpayer was manifest, this consideration "may be the basis for an appeal to Congress", but "it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided."

In any event, the equitable considerations which may favor the taxpayer must be weighed against the administrative difficulties which would be occasioned if its position were sustained. If it be held that an amended declaration of value may be filed upon a showing that a mistake was made in the original return, a heavy and unnecessary burden would be thrust upon the Commissioner. We

[7] It is doubtful, however, whether the taxpayer is receiving inequitable treatment in the instant case. Not only is there evidence of negligence on the part of the treasurer, but the president, J. V. Scaife, appears to have signed the return without examining it. He testified as follows (R. 14): "I took it more as a routine, perfunctory duty. I was under the impression that my brother, before he left for Europe, had instructed Mr. Frey exactly what to do."

are informed by the Bureau of Internal Revenue that, despite the strict language of the statute and of the regulations, and despite the Bureau's consistent policy of denying all claims of amendment, there have been at least 200 cases since 1934 involving amended returns seeking to change the declaration of value in the original return on grounds of mistake. A decision in this case favorable to the taxpayer would obviously cause the number of such amendments to multiply rapidly. The gates would then be open to the unscrupulous taxpayer to juggle its declaration of value in the light of hindsight in order to obtain the lowest possible combination of capital stock and excess profits taxes.

A decision favorable to taxpayer would mean, too, that there would be no precise limitation upon the time within which an amended declaration might be filed by reason of mistake in the original return. The court in the *Lerner* case suggested that the return could be corrected "before the Commissioner has acted in reliance upon it." This suggestion, however, is not only without basis in the statute, but means that the limitation period in every case would vary in accordance with the length of time before the return is audited. It would thus leave open a period of indefinable duration during which the taxpayer could claim a readjustment upon the basis of a previous error.

The longer this period, the greater would be the opportunity afforded the unscrupulous taxpayer to decide whether it would be advantageous to change its declaration of value.

Finally, and most important of all, the practical problem of determining whether a mistake has actually been made appears to be almost insoluble. As we have pointed out, there is no such thing as a "correct" declaration of value in the usual meaning of the word, since the value to be declared depends exclusively upon the discretion of the taxpayer and has no relation to actual facts. The single question which would confront the Commissioner in every case of alleged mistake, therefore, would be whether or not the value actually declared was the value which the taxpayer's officers intended to declare. The difficulty would lie in verifying testimony which, though precisely true in one case, might be totally inaccurate in others. Indeed, the ultimate issue in every case would be the good faith of the taxpayer.

In view of these administrative difficulties, we believe it clear that no equitable considerations to which the taxpayer may point can justify reading into Section 105 (f) a right of amendment which Congress not only failed to provide but which it explicitly prohibited.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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OCTOBER, 1941.

APPENDIX

Revenue Act of 1935, 49 Stat. 1014:

SEC. 105. CAPITAL STOCK TAX [as amended by Section 401 of the Revenue Act of 1936, 49 Stat. 1648].

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. * * * The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted

declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). * * *

SEC. 106. EXCESS-PROFITS TAX [as amended by Section 402 of the Revenue Act of 1936, 49 Stat. 1648].

(a) There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value.

(b) The adjusted declared value shall be determined as provided in section 105 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year). If the income-tax taxable year in respect of which the tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears

the same ratio thereto as the number of months in the period bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income tax purposes for the year in respect of which the tax under this section is imposed, computed without the deduction of the tax imposed by this section, but with a credit against net income equal to the credit for dividends received provided in section 26 (b) of the Revenue Act of 1936.

Treasury Regulations 64 (1936 Ed.):

ART. 37. Time for filing return.—

* * * * *

(b) *Extensions of time.*—The Act authorizes the Commissioner to extend, under such rules and regulations as he may prescribe with the approval of the Secretary, the time for filing returns and paying taxes, subject to the limitation that no such extension shall be for more than 60 days. Pursuant thereto, the respective collectors of internal revenue are hereby authorized to grant, under the conditions prescribed herein, extensions of time for filing capital stock tax returns and for payment of such taxes. In the exercise of such authority, collectors of internal revenue shall grant an extension of time for filing the return and paying the tax, only: (1) upon a written application under oath filed on or before the statutory due date of the return and showing reasonable cause for the extension; (2) for such reasonable period as may be required by the circumstances, not to extend in any case beyond the 29th day of September next following the close of the taxable year; (3) with the provision that interest at the rate of 6 per cent per annum shall be paid upon the tax from the statutory due

date (July 31) to the date of payment of the tax; and (4) in accordance with such procedure as may be prescribed from time to time by the Commissioner. The determination whether an application presents reasonable cause for an extension depends upon the particular circumstances of each case. Ordinarily, a showing of sickness or absence of the officers charged with the responsibility of making the return, or of other circumstances beyond the control of the corporation which prevent the filing of a proper return within the time required by law, constitutes reasonable cause warranting an extension. Accordingly, a corporation desiring an extension of time for filing its capital stock tax return and paying the tax must file with the collector on or before the statutory due date of the return an application under oath setting forth the reasons necessitating an extension and stating the time for which the extension is requested. In every case in which an extension is allowed, a copy of the collector's letter granting the extension shall be attached to the return when filed. For general provisions relating to penalties and interest, see article 82.

ART. 44. *Original declared value* [as amended by T. D. 4667, XV-2 Cum. Bull. 312, 314 (1936).]—(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. "First return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corpo-

ration or by the Commissioner. A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936.

ART. 45. *Adjusted declared value.*—(a) *First taxable year.*—The adjusted declared value for the first taxable year is the original declared value.

If a corporation was in existence during the entire taxable year ended June 30, 1936, the adjusted declared value shall be as of the close of its last income-tax taxable year which ended prior to July 1, 1936. If a corporation makes its Federal income tax return on a calendar year basis, the value declared must be as of December 31, 1935. If a corporation makes its income tax return on a fiscal year basis, the value must be declared as of the close of such fiscal year ended prior to July 1, 1936.

* * * * *

T. D. 4971, 1940– Cum. Bull. 236:

5. Article 44 (a) of Regulations 64 (Capital Stock Tax), approved May 6, 1936, as amended by Treasury Decision 4667, approved July 18, 1936, is amended to read as follows:

"(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value can not be changed, amended, or corrected, either by the corporation or by the Commissioner after the expiration of the statutory period (or any extension thereof) within which the return is required to be filed. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935."

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1941.

Scaife Company, Petitioner, vs. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 22, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

On July 29, 1936, petitioner filed its capital stock tax[1] return for the period ended June 30, 1936. This return was prepared by petitioner's treasurer and signed by petitioner's president. The treasurer had been instructed by petitioner's vice-president to place upon the capital stock a value of $1,000,000. By mistake the value was declared at $600,000. This error was not noted by petitioner's president when he signed the return. When the error was later discovered, a new return was prepared declaring the value of the stock to be $1,000,000. This return was lodged with the Collector on September 3, 1936, and a remittance of $400.00 to cover the additional capital stock tax computed on the higher valuation was tendered. The Collector refused to accept the amended return[2] and the remittance of the additional $400.00. Petitioner then filed a petition with the Board of Tax Appeals for a redetermination of its excess profits tax[3] for 1936, claiming that that tax should be computed on the basis of a declared value for its capital stock of $1,000,000. The Board sustained the action of the Commissioner. 41 B. T. A. 278. The Circuit Court of Appeals affirmed. 117 F. 2d 572. We granted the petition for certiorari because of a conflict between that holding and the decision of the Circuit Court of

[1] Sec. 105(a) of the Revenue Act of 1935, 49 Stat. 1014, 1017, as amended by § 401 of the Revenue Act of 1936, 49 Stat. 1648, 1733, provides:

"For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock."

[2] Petitioner sought to enjoin the Collector from refusing to accept the amended return. The bill was dismissed by the District Court. Wm. B. Scaife & Sons Co. v. Driscoll, 18 F. Supp. 748. The Circuit Court of Appeals affirmed. 94 F. 2d 664. This Court denied certiorari. 305 U. S. 603.

[3] Sec. 106(a) of the Revenue Act of 1935, 49 Stat. 1014, 1019, provides:

"There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in re-

Appeals for the Second Circuit in *Lerner Stores Corp. (Md.)* v. *Commissioner*, 118 F. 2d 455.

Sec. 105(f) of the Revenue Act of 1935 (49 Stat. 1014, 1018) provides that the adjusted declared value of the taxpayer's capital stock shall be the value as declared in the "first return". The value so declared "cannot be amended". § 105(f). The return must be made within one month after the close of the year with respect to which the tax is imposed. § 105(d). While the Commissioner by rules and regulations "may extend the time for making" the return, no extension shall be for more than sixty days. § 105(d). Under Art. 37(b) of Treasury Regulations 64 (1936 ed.) an extension of time for filing the return and paying the tax shall be granted only upon written application under oath filed on or before the statutory due date and on a showing of reasonable cause for an extension. Petitioner sought no such extension. It did, however, file the amended return within the sixty day period.

We agree with the court below that the amended return was properly disallowed. A "first return" means a return "for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year." *Haggar Co.* v. *Helvering*, 308 U. S. 389, 395. The return filed on September 3, 1936 was not timely. The statute is not ambiguous. Once the period for filing the "first return" has expired, the value declared "cannot be amended". Unless an extension had previously been obtained, the period for filing ended one month after the close of the taxable year which in this case was June 30, 1936. Unlike the situation in *Haggar Co.* v. *Helvering*, *supra*, the due date of the return had not been extended. Nor did the statute make mandatory or automatic an extension for sixty days. It merely gave the Commissioner the power to extend the due date under appropriate rules and regulations. And the latter made no provision for an extension after the expiration of the statutory period. It is immaterial that different rules and regulations might have been

spect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value."

Sec. 106(b) provides that the "adjusted declared value shall be determined as provided in section 105 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year)."

promulgated under which an extension might have been obtained in the circumstances of this case. The important consideration is that this amended return was filed after the unextended or statutory due date had expired. In absence of an extension a later due date would have no statutory sanction. See *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55. Furthermore, the mandate of the statute that the declaration of value contained in the first return cannot be amended must be taken to preclude an amendment after the due date if that prohibition is to have real vitality.

But petitioner argues that a court of equity has power to relieve against such mistakes. Cf. *Moffett, Hodgkins & Clarke Co.* v. *Rochester*, 178 U. S. 373. Its contention is that the amended return reflects its original intent rather than a shift in position. But we cannot treat this case like a case for reformation of a contract. We are dealing here with an Act of Congress which not only prescribes the formula for determining the time within which a return may be filed but which also explicitly states that a declaration of value contained in the original return may not be amended. Hence no extension of the due date may be had except pursuant to the procedure which has clear statutory sanction. If we were to grant petitioner the extension which it asks, we would be performing a legislative or administrative,[4] not a judicial, function.

The result in individual cases may be harsh. But that may be true in case of any statute of limitations. As we indicated in *J. E. Riley Investment Co.* v. *Commissioner*, *supra*, such considerations, though a basis for an appeal to Congress for relief in individual cases,[5] are not appropriate grounds for relief by the courts from the strictness of the statutory demand.

Affirmed.

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[4] There are to be distinguished those cases adverted to in J. E. Riley Investment Co. v. Commissioner, *supra*, p. 58, where the Treasury has provided for correction of certain errors or miscalculations in the original returns. Such an example is Art. 43-2 of Treasury Regulations 86 providing for the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year.

[5] Thus Private Act No. 199, c. 440, 50 Stat. 1014, provides that the original declared value of the Jackson Casket and Manufacturing Co., notwithstanding the declaration in its return for the year ending June 30, 1936, should be a value computed on the basis of $125 per share of its capital stock. From the Committee Reports it appears that due to a mistake by Western Union Telegraph Co. in transmitting a message from the president of the company to its cashier, the latter filed a return in which the value of the capital stock was declared to be $175 per share rather than $125 per share as the president had directed. H. Rep. No. 777, 75th Cong., 1st Sess.; S. Rep. No. 730, 75th Cong., 1st Sess.